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Challenging Improper Land Use Decision-Making Under the Equal Protection Clause

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CHALLENGING IMPROPER LAND USE DECISION-MAKING UNDER THE EQUAL PROTECTION CLAUSE

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The Supreme Court has said that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."[1] Equal protection jurisprudence has typically focused on either a claim of disparate treatment based on the plaintiff's membership in a racial or religious group or other "suspect" class, or on an allegedly irrational legislative classification. In its 2000 decision in *Village of Willowbrook v. Olech*,[2] the Court acknowledged a different type of equal protection claim, one based on intentional differences in the treatment of similarly situated individuals, and its potential viability even where the plaintiff is the only party affected by the disparate treatment.

The *Olech* case has relevance in the land use context because it concerns differences in the treatment of individuals, and in fact deals with an applicant's request for a connection to the public water supply. This paper looks at the *Olech* case and its subsequent interpretation in the lower courts. The decision was a mere five paragraphs long, and seemingly very straightforward, but it has prompted varied reactions and considerable disagreement in the lower courts. Additionally, this article addresses considerations relevant to bringing an *Olech* type of equal protection claim on behalf of plaintiffs aggrieved by a local land use decision.

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1. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).

2. Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam).

I. THE *OLECH* CASE

A. *The Facts of the* Olech *Case*

Grace Olech, a Chicago-area homeowner, wished to connect to the public water supply after her well failed.[3] When the Village of Willowbrook asked Mrs. Olech and her husband for a thirty-three foot easement before it would make the connection, the Olechs balked.[4] Previously, the Village had only required a fifteen foot easement for water connections, and the Olechs thought it unfair that they would have to dedicate a greater right of way.[5] Although the Village eventually relented, the change of heart came only after the onset of winter, making it impossible to install the connection for several more months.[6] While they waited, the Olechs were forced to obtain water through a hose using a neighbor's water supply.[7] Mrs. Olech brought an action against the Village and several of its officials, claiming damages for violation of her constitutional rights.[8] She alleged that the Village's action was "irrational and wholly arbitrary," and that the Village acted either with the intent to deprive her of her rights or in reckless disregard of her rights.[9]

B. *The "Ill Will" Theory and the* Esmail *Decision*

The District Court dismissed Olech's equal protection claim for failing to state a cause of action. In so doing, it applied the standard set forth in the Seventh Circuit Court of Appeals case Esmail v. Macrane.[10]

The *Esmail* case was brought by a liquor licensee whose license renewal was denied on grounds that a state court ultimately found spurious.[11] When Esmail sued the City and its officials for damages,

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3. *Id.* at.563.
4. *Id.*
5. *Id.*
6. *Id.*
7. Olech v. Vill. of Willowbrook, 1998 WL 196455, at *1 (N.D. Ill. 1998).
8. *Id.*
9. *Id.*
10. 53 F.3d 176 (7th Cir. 1995).
11. *Id.*

he alleged not only that he had been treated differently from other liquor license applicants, but also that the different treatment was part of a "campaign of vengeance" by the mayor, who was also the licensing official—an "orchestrated campaign of official harassment directed against him out of sheer malice."[12] Esmail identified instances where the police had harassed him and his employees, including repeated police stops, field sobriety tests and the filing of false criminal charges.[13] The Seventh Circuit held that Esmail had stated a claim under the Equal Protection Clause and was entitled to try to prove that the license denial was "a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective." [14]

Following Esmail's lead, Olech had alleged that the Village's request for the wider easement was a result of the "substantial ill will" caused by her previous successful negligence lawsuit against the Village on an unrelated matter.[15] Despite this allegation, the District Court found that "nothing in Olech's complaint beyond conclusory assertions indicated that Willowbrook was acting out of vindictiveness or in retaliation for Olech's prior lawsuit."[16]

The Seventh Circuit disagreed.[17] In the view of Judge Posner, who also wrote the *Esmail* decision, Olech's complaint was sufficient to state a claim under the "animus" or "ill will" theory of equal protection recognized by that Court.[18] The Seventh Circuit noted its concern with the "prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case."[19] But it also noted that the "vindictive action" type of equal protection case "requires proof that the cause of the differential treatment . . . was a totally illegitimate animus towards the plaintiff by defendant."[20] A mere "tincture of ill will" would not invalidate government action. [21]

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12. *Id.* at 178-79.
13. *Id.* at 179.
14. *Id.* at 180.
15. Olech v. Vill. of Willowbrook, 1998 WL 196455 at *2 (N.D. Ill. 1998).
16. *Olech*, 1998 WL 196455, at *3.
17. Olech v. Vill. of Willowbrook, 160 F.3d 386 (7th Cir. 1998).
18. *Id.* at 388.
19. *Id.*
20. *Id.*
21. *Id.*

C. *The Supreme Court's Decision*

The Village petitioned for certiorari and the case was heard by the U. S. Supreme Court.[22] Although the Court upheld the Seventh Circuit, it did so without discussion of that court's "subjective ill will" theory. Instead, the Supreme Court, in a *per curiam* opinion, held that Olech had stated a claim that could "fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners," and also alleged "that the Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement."[23] The Court concluded that "these allegations, quite apart from the Village's subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis."[24] The Court, therefore, affirmed the Seventh Circuit's judgment without reaching "the alternative theory of 'subjective ill will' relied on by that court."[25]

D. *Justice Breyer's Concurrence*

By contrast, Justice Breyer, in a concurrence, opined that allegations of the Village's subjective motivation were the critical factor allowing the *Olech* complaint to survive dismissal. In his view, the presence of the "extra factor" of "'vindictive action,' 'illegitimate animus,' or 'ill will'" in the complaint was required to give otherwise routine zoning and other permitting decisions constitutional significance.[26] As he observed, "zoning decisions . . . will often, perhaps almost always, treat one landowner differently from another, and one might claim that, when a city's zoning authority takes an action that fails to conform to a city zoning regulation, it lacks a 'rational basis' for its action (at least if the regulation in question is reasonably clear)."[27] In Justice Breyer's view, the presence of the

22. Vill. of Willowbrook v. Olech, 528 U.S. 562, 562 (2000).
23. *Id.* at 565.
24. *Id.*
25. *Id.*
26. *Id.* at 565-66 (Breyer, J., concurring).
27. *Id.* at 565.

added factor of "ill will" in the Olech case was "sufficient to minimize any concern about transforming run-of-the-mill zoning cases into cases of constitutional right."[28]

II. CASE LAW FOLLOWING *OLECH*

Lending some support to Justice Breyer's concern about an increased burden on the courts, over three hundred published federal and state cases have cited to the *Olech* decision in the ensuing four years.[29] This is an average of more than one a week, although some of these cites are not with reference to the viability or merits of a "class of one" equal protection claim.[30] These cases are by no means all land use disputes. A significant number allege equal protection violations with respect to employment disputes, treatment of prisoners, and the provision of public services such as police protection, among other matters. From a survey of sixty-six federal and state cases reported in 2003 that cite to *Olech* in the "class of one" equal protection context, twenty concern disputes over land use or real property.[31]

After *Olech*, not only are equal protection claims of the "class of one" type more prevalent in the courts, but also it is now more likely

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28. *Id.* at 566.

29. A search on Westlaw for cases citing *Olech* as of April 25, 2004, identified 320 cases.

30. Following the terminology used by the Supreme Court in *Olech*, this paper refers to the type of claim based on disparate treatment outside the protected class context as a "class of one" claim, although such a claim need not be brought by only one plaintiff. Indeed, the Supreme Court noted that the *Olech* complaint was brought on behalf of three neighbors as well as Mrs. Olech's late husband, and could be read to allege a "class of five." The court concluded, however, that "the number of individuals in a class is immaterial for equal protection analysis." *Olech,* 528 U.S. at 564.

31. Based on the author's review of court decisions identified through a Westlaw search for cases citing to *Olech* from January, 2003 through October 10, 2003, and excluding those that do not address a "class of one" type equal protection claim.

that they will survive beyond the pleadings stage.[32] A recent article found a nine percent success rate over a twenty-five year period for equal protection plaintiffs whose rational basis claims were reviewed by the Supreme Court, and hypothesized on that basis that "class of one" equal protection claims should rarely be successful.[33] It found, however, that plaintiffs had prevailed in thirty-five percent of federal district court decisions citing *Olech* and involving "class of one" type claims.[34] A survey of more recent decisions found that federal plaintiffs prevailed on their *Olech* type equal protection claims (generally by surviving motions to dismiss or for summary judgment) twenty-four percent of the time.[35]

A. *The Standard for Pleading a "Class of One" Claim*

A recent Second Circuit Court of Appeals decision addresses pleading requirements for an *Olech* type claim and reinforces the view that the standard for stating such a claim may be rather forgiving. In *DeMuria v. Hawkes*,[36] the plaintiffs had sought police assistance in response to alleged harassment by their neighbor.[37] Their

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32. Dwight H. Merriam, *Good and Evil in the Village of Willowbrook: the Story of the Olech Case*, 23 ZONING & PLAN. L. REP. 33 (May 2000) (suggesting that after *Olech*, "defendant local governments should save their energy for motions for summary judgment and not try to dispense with such cases on the pleadings.").

33. Robert C. Farrell, *Classes, Persons, Equal Protection, and Village of Willowbrook v. Olech*, 78 WASH. L. REV. 367, 416 (2003).

34. *Id.* All but two of the cases in which plaintiffs "prevailed" on their equal protection claim were denials of motions to dismiss or motions for summary judgment. *Id.*

35. Of fifty-eight 2003 federal district and court of appeals cases citing *Olech* reviewed by the author of this paper, fourteen allowed the plaintiff's "class of one" based equal protection claim to go forward. When claims brought by prisoners (which were uniformly unsuccessful) are excluded, the rate increases to 29 percent. Land use based equal protection claims brought to federal court had a 36 percent success rate (5 out of 14).

36. 328 F.3d 704 (2d Cir. 2003).

37. The underlying dispute was one of those "Hatfield v. McCoy" type feuds between neighbors with which most real estate practitioners are familiar. The row started with a dispute over surface water

complaint alleged that in refusing to arrest the neighbor, Officer Hawkes had treated the DeMurias differently than other citizens, but the complaint "did not name any similarly situated individuals or identify any differently-handled disputes."[38] The trial court dismissed the complaint on the grounds that the allegations were not specific enough to state a viable claim.[39] The Second Circuit reversed, holding that

> the *Olech* opinion does not establish a requirement that a plaintiff identify in her complaint actual instances where others have been treated differently for the purposes of equal protection. Indeed, it appears that Olech herself did not "name names" in her complaint, but made the more general allegation that similarly situated property owners had been asked for a different easement. The Supreme Court found that such an allegation could "fairly be construed" as sufficient for stating an equal protection claim.[40]

The Second Circuit also found that the plaintiff had alleged that the disparate treatment was intentional. The Court found "these allegations sufficient, albeit barely, to meet the minimal level established by *Olech* for 'class of one' equal protection claims at the pleading stage."[41] However, the Court also acknowledged the heavy burden that would be placed on the plaintiffs to prove their allegations as the case proceeded.[42]

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flow and, according to the plaintiff, resulted in a year-long campaign of harassment against them which included threats, attempts to have their water turned off and trash removal stopped, offensive mailings sent to their house, repeated harassing and threatening phone calls, and an attempt to have their backyard excavated without their consent. *Id.*

38. *DeMuria,* 328 F.3d at 705.

39. *Id.* at 704.

40. *Id.* at 707.

41. *Id.*

42. *Id.*; *see also* Nevel v. Vill. of Schaumburg, 297 F.3d 673, 682 (7th Cir. 2002) (finding that Plaintiffs' failure to point to any similarly situated property owners who were treated more favorably than they were, is fatal at summary judgment stage, and that it is not enough to rely on government's failure to identify instances where it treated others as it had the plaintiffs.).

The *Olech* decision has surely raised the profile of these types of claims and may have made it easier to get them into court. However, plaintiffs looking to prevail on these newly popular "class of one" claims face a judiciary that, like Justice Breyer, is concerned with the potential scope and frequency of such claims and anxious to limit their effect.

B. *"Ill Will" in "Class of One" Claims After* Olech

One lingering issue after *Olech* is the role of "ill will" or "animus" in equal protection claims.[43] Reading the Supreme Court's decision literally, it should be possible for a plaintiff to sustain an equal protection claim by proving, without more, that she was harmed by being intentionally treated differently from others who are similarly situated, and that the disparate treatment had no rational basis. As the Supreme Court stated, such claims may be viable "quite apart from" the subjective motivation of the government actor.

Although a rational basis inquiry is already highly deferential to the government decision-maker, some federal courts have been reluctant to acknowledge the viability of a "class of one" claim if the plaintiff cannot also show that the government had an illegitimate motive, such as discrimination, retaliation, "malicious intent" or some other "bad faith" motivation. A line of cases, principally in the Seventh and Second Circuits and their district courts, holds fast to the notion that subjective bad faith is an essential component of a "class of one" equal protection claim. The Fifth Circuit also seems to endorse this approach, which serves to limit the impact of *Olech*, and the case law in several other circuits remains muddled. For this reason, plaintiffs bringing "class of one" actions should be prepared to plead and prove any facts that might show subjective "ill will" on the part of the defendant.

In the Seventh and the Second Circuits particularly, courts have struggled with the role of "ill will" in a "class of one" case. In a series of post-*Olech* decisions, including *Hilton v. City of Wheeling,*[44]

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43. For additional discussion of this subject see Michael S. Giaimo, *Ill Will and Class of One: Equal Protection Claims after the Olech Decision*, 55 LAND USE L. & ZONING DIG., Feb. 2003, at 3.

44. 209 F.3d 1005 (7th Cir. 2000), *cert. denied*, 531 U.S. 1080 (2001); *see also* Purze v. Vill. of Winthrop Harbor, 286 F.3d 452

the Seventh Circuit has maintained its pre-*Olech* requirement of a showing of illegitimate animus as part of an equal protection claim by a "class of one" plaintiff. Later Seventh Circuit decisions, however, seem to identify two distinct types of "class of one" equal protection claims.

In *Nevel v. Village of Schaumburg*, the owners of a designated historic landmark house who had been refused permission to improve it with vinyl siding pressed an equal protection claim.[45] In upholding the District Court's grant of summary judgment for the defendants, the Seventh Circuit separately considered theories that the plaintiff was "(1) 'intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,' or (2) 'that the government is treating unequally those individuals who are prima facie identical in all relevant respects, and that the cause of the differential treatment is a 'totally illegitimate animus toward the plaintiff by the defendant.'"[46]

Although phrased in the disjunctive by the *Nevel* court, the second test may in practical effect be merely a subset of the first, rather than a separate basis for a "class of one" claim. The *Nevel* court goes on to say that "under the second approach, if the government would have taken the action anyway, the animus will not condemn the action. Ill will must be the sole cause of the complained-of action."[47] It is difficult to see how this requirement will differ in most cases from a requirement that there be no rational basis for the government's decision—the crux of the first *Nevel* test.[48] Indeed, when the plaintiffs in *Nevel* pressed their claim under the second test they lost. The court found that even if the "Board denied the Nevels' request in order to punish them" it would not constitute a totally illegitimate animus because the board also had a legitimate interest in upholding

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(7th Cir. 2001); Cruz v. Town of Cicero, 275 F.3d 579 (7th Cir. 2001).

45. *Nevel*, 297 F.3d at 673.

46. *Id.* at 681 (citing Albiero v. City of Kankakee, 246 F.3d 927 (7th Cir. 2001)).

47. *Id.*

48. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001) (stating that while biases "may often accompany irrational (and therefore unconstitutional) discrimination, their presence alone does not a constitutional violation make.").

its rules and regulations[49]—in other words, the decision was rationally based.[50] In order to prevail on the second type of claim when it would not have prevailed on the first, a Seventh Circuit plaintiff would apparently need to prove that the action was taken for an illicit reason, and that the government would not in fact have taken the action for any other reason, even if it would have been rational to do so.

The Seventh Circuit has yet to disavow *Hilton's* formulation, and some decisions of that court and the courts below it continue to muddle the issue.[51] For example, the Northern District of Illinois continues to quote from *Hilton* that, "to make out a *prima facie* ["class of one" equal protection] case, plaintiffs must present evidence that the defendant deliberately sought to deprive [them] of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."[52]

For its part, the Second Circuit has yet to acknowledge that *Olech* changed the law of that jurisdiction. In a series of post-*Olech* decisions, the court has managed to avoid squarely confronting the inconsistency between its historic requirement that an equal protection plaintiff show "impermissible considerations" such as a "bad faith intent to injure a person," and the Supreme Court's holding that such ill will is not a necessary element of the claim.[53] For example, in *Harlen Associates v. Village of Mineola*, the Second Circuit held that the plaintiff convenience store owner was unable to show either that

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49. *Nevel*, 297 F.3d at 682.

50. *But see* N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1124 (2003) (citing similar Second Circuit formulation for proposition that an allegation of an impermissible motive and of animus is sufficient to establish an equal protection issue "in lieu of irrationality").

51. *See, e.g.*, Cady v. Vill. of McCook, 57 Fed. App. 261, 264 (2003) (citing *Hilton* for the proposition that *Olech* requires the plaintiff to prove he was denied equal protection "for reasons of a personal nature").

52. *See, e.g.*, O'Sullivan v. City of Burbank, 2003 WL 22287349, at *5 (N.D. Ill. Sept. 30, 2003); Am. Nat'l Bank and Trust Co. of Chi. v. Town of Cicero 2003 WL 1712561 (N.D. Ill. Mar. 28, 2003).

53. Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001) (citing La Trieste Rest. & Cabaret v. Vill. of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994)).

there was no rational basis for the denial of its application for a special use permit or that the denial was illicitly motivated, so that it did not need to reach the issue of whether *Olech* had changed the Circuit rule.[54] Most recently, in *DeMuria*, the court once again left "for another day" the decision "whether *Olech* removed our Circuit's requirement that an illicit motivation be shown to establish a valid equal protection violation."[55] As in the Seventh Circuit, this lack of resolve and clarity has perpetuated confusion in the district courts.[56]

The Fifth Circuit, too, has read *Olech* to require the plaintiff to show an illicit subjective motivation on the part of the defendant in order to prove an equal protection violation, even in the "class of one" context.[57] In both *Bryan v. City of Madison*[58] and *Beeler v. Rounsavall,*[59] the plaintiffs failed to allege an "improper motive" for the defendants' actions, and the court thus characterized their claims of procedural mistreatment in a permitting process as "selective enforcement," and denied relief under the equal protection clause. The law in several other jurisdictions likewise appears to be in disarray on this point.[60]

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54. *Id.*

55. DeMuria v. Hawkes, 328 F.3d 704, 707 (2d Cir. 2003).

56. *See, e.g.*, Gavlak v. Town of Somers, 267 F. Supp. 2d 214, 225 (D. Conn., 2003) (finding that "*Olech* seems to have left open the question of whether malice or bad faith must be shown to state a valid "class of one" equal protection claim ...," and the Second Circuit has not resolved the question).

57. *See* Shipp v. McMahon, 234 F.3d 907, 916 (5th Cir. 2000), *cert. denied,* 532 U.S. 1052 (2001).

58. 213 F.3d 267 (5th Cir. 2000), *cert. denied,* 531 U.S. 1145 (2001).

59. 328 F.3d 813 (5th Cir. 2003).

60. *See, e.g.*, Mimics, Inc. v. The Vill. of Angel Fire, 2003 WL 21990004 (D. N.M. Aug. 12, 2003) (citing Bartell v. Aurora Pub. Schs., 263 F.3d 1143, 1149 (10th Cir. 2001), for proposition that a "class of one" claim requires "a spiteful effort to 'get' plaintiff for reasons wholly unrelated to any legitimate state objective"). *Compare* Lakeside Builders, Inc. v. Planning Bd., 2002 WL 31655250 (D. Mass. Mar. 21, 2002) (holding that a claim failed because of its failure to plead facts tending to show that the board denied requested subdivision waivers "for reasons of a personal or improper nature.") *with* Envision Realty, LLC v. Henderson, 2001 WL 1505491 (D.

C. *The Role of Intent in "Class of One" Claims*

After *Olech*, "class of one" plaintiffs should be prepared to show not only that they have been discriminated against by a governmental defendant, but that the offending acts or omissions occurred with the defendants' knowledge that they were applying different treatment to similarly situated parties. Courts have tried to exclude garden variety grievances about unequal treatment from the universe of viable equal protection claims by adopting a constrained view of when disparate treatment is "intentional."[61] They do so by construing the requirement that a plaintiff be "intentionally treated differently" to mean that the government actor must have *meant to discriminate*, not simply that it must have meant to take the action that resulted in the discrimination.

For example, in *Indiana Land Company LLC v. City of Greenwood*,[62] the plaintiff alleged that its equal protection rights were violated because its rezoning petition was rejected when the city council invoked a local ordinance requiring a two-thirds vote rather than a majority vote to reverse a recommendation of the planning commission. The plaintiff noted that a petitioner who was allegedly similarly situated, had, three years previously, had a simple majority vote applied to its petition.[63] It was clear from the facts recited by the court that after first proceeding with its customary majority vote, which came out in the plaintiff's favor, the council had made a conscious and deliberate decision to invoke the two-thirds vote ordinance.[64] Indeed the council even went so far as to engage in a floor debate as to whether the two-thirds vote ordinance was contrary to state law, and ignored the city attorney's opinion that it was.[65] Nonetheless, the court refused to find discriminatory intent, speculating that the earlier council may not have been aware of the two-thirds vote ordinance when it evaluated the earlier petition, and noting that the plaintiff had not produced any evidence that any of the

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Maine Nov. 28, 2001) (finding that allegations not claiming bad faith motivation for discrimination in zoning matters were sufficient under *Olech* to state a claim).

61. *See* Farrell, *supra* note 33, at 407-11.
62. 2003 WL 22208795 (S.D. Ind. Sept. 4, 2003).
63. *Ind. Land Co.*, 2003 WL 22208795,. at *8.
64. *Ind. Land Co.*, 2003 WL 22208795, at *4.
65. *Ind. Land Co.*, 2003 WL 22208795, at *8.

current city councilors had in fact been motivated by discriminatory intent in applying the two-thirds vote requirement.[66]

The summary judgment proceedings in the *Olech* case itself on remand to the Northern District of Illinois provide another example of this approach.[67] In denying the village's summary judgment motion, the court found a genuine issue of material fact as to whether the village had intentionally treated Olech differently from other similarly situated property owners. Olech had identified other property owners who were provided with village water without being required to dedicate an easement. The village asserted that when it installed water to these properties, it did not know that it had not received an easement from the property owners, and therefore it did not intend to treat Olech differently. The court held that this factual dispute precluded summary judgment.[68] Thus, the trier of fact would have to determine whether the Village's disparate treatment of Olech was intentional in the sense that it was done with knowledge that the actions taken resulted in disparate treatment of similarly situated parties.

On remand, Mrs. Olech's claim survived summary judgment.[69] However, in many other cases, construing the term "intentionally" to require proof of knowing discrimination will result in claimants being unable to survive summary judgment. By contrast, interpreting "intentionally" as simply calling for a showing that the government deliberately took the complained-of action with respect to the plaintiff (without regard to whether it was aware that it had treated others more favorably), would result in many more claims surviving early dismissal.

A still more rigorous gloss on the "intentionally" requirement calls for the plaintiff to show that the defendant acted not merely with knowledge of the disparate effect of its action, but in order purposefully to discriminate against the plaintiff.[70] Under such a standard, the plaintiff would have to show that the defendant acted "because of" and not just "in spite of" the adverse effects its actions had on the

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66. *Ind. Land Co.*, 2003 WL 22208795, at *8.

67. Olech v. Vill. of Willowbrook, 2002 WL 31317415 (N.D. Ill. Oct. 10, 2002); *see also* Farrell, *supra* note 33, at 410.

68. *Olech*, 2002 WL 31317415, at *16-17.

69. Oddly, this was only because the *defendant* raised a question of fact.

70. Farrell, *supra* note 33, at 411.

plaintiff.[71] Some courts have employed this approach in evaluating "class of one" claims.[72] This standard would eliminate equal protection claims where the arbitrary conduct results from inattention or accident.[73] However, there appears to be little practical difference between such a requirement and the type of subjective motivation or "animus" requirement that the Supreme Court in *Olech* says is unnecessary to sustain a claim.

D. *The "Similarly Situated" Test*

Whether the plaintiff will be able to identify parties who are similarly situated and have been treated better is another critical element in evaluating a "class of one" equal protection claim. This cause of action does not protect against even the worst form of governmental action unless there are others whom the plaintiff can point to who have been treated better by the same defendant. It has been noted that "[w]ithout an allegation that other persons similarly situated were treated differently, the 'equal' portion of the Equal Protection clause becomes meaningless."[74]

Determinations as to similarity of situation are made on a highly fact-specific, ad hoc basis. The Second Circuit has opined that the question of whether the similarly situated prong is satisfied is ordinarily a question for the jury, although a court "can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met."[75] Courts sometimes go to great lengths to avoid finding that a party has identified others who are similarly situated.[76] This can be a problem for a plaintiff in a land use case because someone looking to distinguish one piece of

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71. Neaves v. City of San Diego, 70 Fed. App. 428, 430 (9th Cir. 2003) (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

72. Pariseau v. City of Brockton, 135 F. Supp. 2d 257 (D. Mass. 2001); McWaters v. Rick, 195 F. Supp. 2d 781 (E.D. Va. 2002), *rev'd.*, Mc Waters v. Cosby, 54 Fed. App. 379 (4th Cir. 2002).

73. *See* Farrell, *supra* note 33 at 411.

74. Econ. Opportunity Comm'n of Nassau County, Inc. v County of Nassau, 106 F. Supp. 2d 433, 441 (E.D.N.Y. 2000).

75. *See* Harlen Assocs. v. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001).

76. *See* Farrell, *supra* note 33 at 411-15.

property or proposed development from all others does not have to work particularly hard to find ways to support that proposition. For example, location, access to roadways, zoning district, topography, size and previous use are among the myriad of factors that serve to distinguish one parcel from another. Furthermore, in a permitting context, the timing of the application may serve to distinguish one otherwise similar applicant from another.

This proposition is illustrated by *McDonald's Corp. v. City of Norton Shores*,[77] which addressed an equal protection claim involving the denial of site plan approval for a fast food restaurant because of traffic concerns. The plaintiff put forward evidence showing that its application was one of only three site plans denied by the planning commission in the preceding five years, and that neither of the other denials involved a restaurant. There was also evidence before the court that there were nine other fast food restaurants with drive-through windows in the city, including a few others located on the same street, and that at about the same time as the plaintiff was denied, a restaurant without a drive-through window was approved at the site adjoining plaintiff's and another restaurant was later approved across the street.[78] In dismissing the plaintiff's *Olech* based equal protection claim, the court concluded that none of these successful applicants were similarly situated, since the restaurants in question either were not located on the same street, had obtained their approval substantially before the plaintiff applied, or did not have drive-through windows.[79]

Another example is the aforementioned *Indiana Land Company* case.[80] There the court agreed with the City that the plaintiff was not similarly situated to an earlier applicant because the earlier applicant was before a "different and previous" city council, which had the guidance of a different city attorney.[81] Furthermore, the plaintiff's and the earlier applicant's "procedural postures . . . were slightly different."[82] In the applicant's case, the city council voted 4-3 to overturn a favorable recommendation by the plan commission, while

77. 102 F. Supp. 2d 431 (W.D. Mich. 2000).
78. *Id. at* 433-34.
79. *Id* at 438.
80. *See supra* note 63 and accompanying text.
81. *Indiana Land Co.*, 2003 WL 22208795, at *8.
82. *Indiana Land Co.*, 2003 WL 22208795, at *8.

in the earlier case the 4-3 vote was to reverse an unfavorable plan commission recommendation.[83]

The *Olech* Court's formulation of the "class of one" cause of action says nothing about whether the plaintiff class needs to be inclusive of all similarly situated parties who have been mistreated by the defendant. However at least one district court has held that it is not enough for the plaintiff to establish that it was treated worse than others similarly situated. A plaintiff must also show that it was "singled out" in such a way that there are *no other* similarly situated non-plaintiffs who were themselves treated the same or worse than the plaintiff.[84] That case involved allegations by public defenders that the defendant county had been arbitrary and irrational with respect to pay grades and promotions. The court held that plaintiffs had failed to meet their burden to "prove that they were singled out and that no one was similarly mistreated."[85] The court explained:

> Defendants have arguably treated numerous Attorney Supervisors as unfairly as it treated Plaintiffs and has similarly paid these non-Plaintiffs less money than other Attorney Supervisors. Proof that other, non-Plaintiff supervisory attorneys are arguably mistreated by Defendants' hiring and promotions system results in Plaintiffs' inability to maintain an equal protection claim under the "class of one" theory.[86]

Under the logic of this theory, only the very worst treated among a number of similarly situated plaintiffs would have a viable equal protection claim.

E. *Other Efforts to Confine* Olech

At least one court has taken the remarkable view that the *Olech* decision should be confined to the land use context. In *Cain v. Tigard-Tualatin School District 23J*,[87] the District Court for the District of Oregon held that:

> The Supreme Court gave no indication that the holding extended beyond matters involving municipal property

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83. *Indiana Land Co.*, 2003 WL 22208795, at *8.
84. Kozlowski v. Fry, 238 F. Supp. 2d 996, 1024 (N.D. Ill. 2002).
85. *Id.*
86. *Id.*
87. 262 F. Supp. 2d 1120, 1130 (D. Ore. 2003).

> disputes. The Supreme Court surely would have spoken more clearly if it intended to extend the reach of the Fourteenth Amendment's Equal Protection Clause to every instance of arbitrary state action. Plaintiffs' wide-ranging interpretation of *Village of Willowbrook* [*Olech*] would grant relief to any public employee or student who was "singled out" by a state official. Such a reading extends well beyond the limits of the Fourteenth Amendment.[88]

Nothing in the language or logic of *Olech* seems to support this narrow reading.

F. *The Future of "Class of One" Equal Protection Claims in the Land Use Permitting Context*

A "class of one" equal protection claim remains an attractive legal theory, given proper facts, for an aggrieved permit applicant or property owner that believes it has been mistreated by the government. This is true notwithstanding the significant hurdles that must be cleared in order to prevail. Unlike typical permit appeal procedures, but like other civil rights actions, the "class of one" equal protection claim affords the prospect of recovering costs and damages for the loss suffered as a result of the erroneous decision. Furthermore, unlike a substantive due process claim, the equal protection cause of action does not depend on the ability to establish a protected property interest. Nor is such a claim subject to the extraordinary ripeness requirements imposed upon regulatory taking claims.[89] Also, unlike a regulatory taking plaintiff, the aggrieved permit applicant proceeding on an equal protection theory need not be concerned with whether it has been deprived of all or substantially all of its property.

Furthermore, the success of Mrs. Olech herself, and some other plaintiffs, in surviving dismissal and summary judgment, should fos-

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88. *Id.*

89. *See* Carpenteria Valley Farms, Ltd. v. County of Santa Barbara, 2003 WL 22176120 (Sept. 23, 2003) (finding that equal protection claims alleging mistreatment by the imposition of conditions on and delay in receiving residential building permit and conditional use permit for recreational polo field are separate claims distinct from as-applied takings challenge and therefore may proceed, notwithstanding *Williamson County* ripeness rules).

ter the hopes of future claimants. Given the high financial stakes at issue in land use permitting decisions, along with the inconsistent and petty behavior that characterizes some local permitting boards and officials, one would expect that the courts will continue to see a steady flow of "class of one" equal protection actions in the land use context.